Cir. Ct.
DISTRIBUTED
DEC 20 '82

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
Case No. 82-5466

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

RECEIVED
DEC 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT
OF CERTIORARI TO THE WISCONSIN SUPREME COURT

GORDON BREWSTER BALDWIN

Attorney for Petitioner.

Of Counsel:
Archie E. Simonson
Margaret Ann Satterthwaite

Post Office Address:

The Law School
University of Wisconsin
Madison, Wisconsin 53706
(608) 263-2077

10

CASE NO. 82-5466

SUPREME COURT OF THE UNITED STATES
October Term, 1982

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment as applicable to the states by virtue of the Fourteenth Amendment, which is quoted in the petition for writ of certiorari.

Section 345.22 Wis. Stats. (1977) which is quoted in the State's Response to the Petition.

Section 345.20(1)(a), Wis. Stats. (1977), which provides:

> "Traffic regulation" means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with 349.06.

ARGUMENT

In its Response to the Petition for Writ of Certiorari the State of Wisconsin argues that the precise question raised in the Petition was not properly raised in the lower courts and therefore this Court cannot address the question. The question as set forth in the Petition is:

> "Do the Fourth and Fourteenth Amendments prohibit police from making a non-consensual warrantless night entry into a person's home to arrest him for a violation of a non-jailable

traffic offense committed outside the presence of the police?"

The State argues that the case was treated as a misdemeanor rather than a non-jailable, i.e. civil, traffic offense and that therefore this Court is precluded from reviewing the question presented by the Petition.

By the Court's own rule "the question presented will be deemed to comprise every subsidiary question fairly included therein." Supreme Court Rule 21.1(a). Quintessentially the question presented and fairly included therein, is the sort of emergency or dangerous situation, i.e., the degree of exigency, if any, which will justify a warrantless non-consensual entry into the home of a citizen. This is the exact question left open by this Court in Payton v. New York, 445 U.S. 573, 583 (1980).

From the beginning petitioner challenged the validity of the arrest in the home based on lack of consent, and lack of exigent circumstances. Wisconsin Supreme Court Brief of State of Wisconsin, p. 2, R-Ap. 223. The State in its Response at page 2 agrees that the petitioner argued to the Wisconsin Court of Appeals that the arrest was invalid because the police did not possess probable cause and no exigent circumstances existed. Furthermore at page 5 of the petitioner's Wisconsin Court of Appeals brief the argument regarding the civil nature of the arrest was precisely raised.

> "In the present case, the entry of the defendant's dwelling without consent was to effect a warrantless arrest in a civil-type of special proceeding. It is highly doubtful whether the seriousness of this offense under any circumstance could justify such an intrusion into one's home by the state; especially where the police went to the defendant's home initially to only investigate the possibility of such an offense." R-Ap. 238.

The State's brief to the Court of Appeals ignored the civil nature of the arrest and argued at pages 3-4 that probable cause and exigent circumstances would justify a warrantless entry into the home to effect an arrest, apparently no matter how minor the underlying offense. R-Ap. 265-66. The petitioner's reply brief at page 2 argued that the police had only probable cause to investigate, not to arrest, and that the level of generality urged by the State on the issue of exigent circumstances was "constitutionally unsound." R-Ap. 274.

While the State and the Wisconsin Court of Appeals failed to note that the arrest in this case, as opposed to the charge, was for a civil offense, there can be no doubt that the issue joined by the parties and addressed by that court concerned the weight which should be given to the nature of the offense when determining whether or not "exigent circumstances" existed which would justify a warrantless entry into the home to effect an arrest.

Judge Gartzke writing for the Court of Appeals may well have viewed the arrest, as well as the charge, as being for a misdemeanor but even if he viewed it as such, he used a balancing test (R-Ap. 145) and ruled that the need to effect the arrest in this case was not so compelling, i.e., the circumstances were not so exigent, as to justify an intrusion into the sanctity of the home.

On review to the Wisconsin Supreme Court the State argued that the Court of Appeals placed undue emphasis on the seriousness of the crime and argued that the category of probable cause and exigent circumstances is sufficient to validate a warrantless arrest in the home regardless of the nature of the offense. Wisconsin Supreme Court Brief of State of Wisconsin, p. 14, R-Ap. 171. The petitioner took issue with this proposed

category approach by adopting Judge Gartzke's opinion and analysis in his brief. Wisconsin Supreme Court Brief of Defendant-Appellant, p. 7, R-Ap. 213. He also argued as noted by the State's Response at page 3 that the police lacked probable cause to believe a crime had been committed since there was no evidence in the record that the police knew that this was anything other than a first offense under §346.63(1), Wis. Stats. (1977). The State responded to this latter argument by the alternative arguments of waiver of the issue or authority to arrest for the traffic regulation violation under §345.22, Wis. Stats. (1977) State's Response, p. 3-4.

Section 345.22, Wis. Stats. (1977), allows the police to make a warrantless arrest for a violation of a traffic regulation and the definition of traffic regulation in §345.20(1)(a) indicates that violations of such regulations carry penalties of forfeitures only. Hence, in addressing the merits of the petitioner's argument the State conceded that the arrest here was for a civil offense.

The majority opinion of the Wisconsin Supreme Court ignored the State's waiver argument, treated the arrest as one for a civil forfeiture violation, and held that the police had authority to arrest both under §345.22, Wis. Stats. (1977) because the case met the statutory probable cause standard, and under its view of case law requirements for probable cause coupled with exigent circumstances. 108 Wis. 2nd 326 n. 5, R-Ap. 108.

In reaching this conclusion regarding probable cause and the authority to arrest, the majority assumed the constitutionality of the statute and ignored the protestations of the dissenters who doubted authority under the Wisconsin law to effect a warrantless arrest for a civil offense committed outside the presence of the police. R-Ap. 126.

The majority opinion further went on to analyze the validity of the arrest by the probable cause and exigent circumstances categories of hot pursuit, threat to safety, and destruction of evidence urged by the State in its briefs and set forth by this Court in felony cases. The majority opinion (as the State correctly points out in its Response at page 4) does not discuss whether the requirements for a valid warrantless arrest in the petitioner's home differ depending on whether the arrest was for a felony, a misdemeanor, or a civil forfeiture offense but the majority by its recognition of the civil nature of the arrest and its citations to felony case law held that the requirements do not differ.

Having failed to address the civil arrest issue when raised by the petitioner in his Wisconsin Court of Appeals brief and having succeeded in its attempt to get the Wisconsin Supreme Court to adopt its suggested approach to warrantless arrest analysis in the factual context of the instant case, the State should not now be arguing to this Court that the question presented in the Petition should not and cannot be reviewed by this Court.

Certainly the issue of exigent circumstances, i.e., the sort of emergency or dangerous situations, which will justify a warrantless non-consensual entry into the home of a citizen to effect an arrest was raised by the petitioner in all the lower courts, was argued by the parties and decided by the courts at all levels. No matter whether this Court views the case as involving a misdemeanor or a civil forfeiture violation and no matter what decision this Court reaches on the precise question stated in the Petition and any other "subsidiary questions fairly included therein," the exigent circumstances issue is properly before this Court.

Finally the State argues that the petitioner's reference to the lack of evidence in the record regarding the time it would take to obtain a warrant raises only a question of the sufficiency of the evidence to support the court's finding of exigent circumstances. Such questions it argues are not normally the type of question which this Court reviews on certiorari. State's Response at p. 8. But the amount and type of evidence needed to support legal conclusions of exigent circumstances of hot pursuit, threat to safety, and destruction of evidence are subsidiary questions fairly included within the question of exigent circumstances and may also be reviewed by this Court.

CONCLUSION

For the reasons tendered here, petitioner requests the Court to grant his petition for a writ of certiorari.

Petitioner argues that this is a case deserving summary reversal of the decision of the Supreme Court of Wisconsin.

Dated this 17th day of December, 1982.

Gordon Brewster Baldwin
Attorney for Petitioner

Of Counsel:
Margaret Ann Satterthwaite

Post Office Address:
Law School
University of Wisconsin
Madison, Wis. 53706
(608) 263-2077